

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, APRIL 6, 2007

APPLICATION OF

HIGHLAND NEW WIND DEVELOPMENT, LLC

CASE NO. PUE-2005-00101

For Approval to Construct, Own and
Operate an Electric Generation
Facility in Highland County,
Virginia pursuant to §§ 56-46.1 and
56-580 D of the Code of Virginia

ORDER REMANDING FOR FURTHER PROCEEDINGS

On November 8, 2005, Highland New Wind Development, LLC ("Highland Wind" or "Applicant") filed an application for approval to construct, own and operate an electric generation facility in Highland County, Virginia, pursuant to §§ 56-46.1 and 56-580 D of the Code of Virginia ("Code"). Highland Wind proposes to construct and operate a wind energy generating facility in Highland County, Virginia, near the West Virginia border, just northeast of U.S. Route 250 on parts of Allegheny Mountain known as Red Oak Knob and Tamarack Ridge.¹ The proposed facility would consist of up to twenty wind turbines of 2.00 MW nominal capacity, each mounted on free-standing tubular towers with the rotors reaching up to a height of 400 feet.² A new substation with transformers and other equipment would interconnect the proposed facility to an existing 69 kV line owned by Allegheny Power.³

On December 28, 2005, the Commission issued an Order for Notice and Hearing that, among other things, directed the Applicant to publish notice of its application, established a

¹ Application at 2.

² *Id.* at 7.

³ *Id.* at 7-8.

procedural schedule, set hearing dates to receive public comment and evidence, and appointed a Hearing Examiner to conduct all further proceedings. The following parties participated in this case as respondents: Ralph H. Swecker, Christopher T. Swecker, Pendleton Stokes Goodall, III, McChesney Goodall, III, William Stokes Goodall, Wayne Stokes Goodall, and Gregory Warnock (collectively, "Highland Citizens"); Nature Conservancy in Virginia ("Nature Conservancy"); Highland County Board of Supervisors ("Highland County"); and Michel A. King, *pro se*.

On March 1, 2007, Hearing Examiner Alexander F. Skirpan, Jr., entered a Report that explained the extensive procedural history of this case, summarized the record, analyzed the evidence and issues in this proceeding, and made certain findings and recommendations ("Hearing Examiner's Report"). As highlighted in the Hearing Examiner's Report, 216 individuals filed written or electronic comments in opposition to the proposed project, and 93 individuals filed written or electronic comments in support of the proposed project.⁴

The Hearing Examiner explained that on March 13 and 14, 2006, local hearings to receive public testimony were held in the Highland Elementary School Gymnasium, Myers-Moon Road, Monterey, Virginia. Twenty-seven public witnesses testified on March 13th and 39 public witnesses testified on March 14th.⁵ Evidentiary hearings were subsequently held in Richmond on October 3, 30, and 31, 2006 and November 1, 6, 15, and 16, 2006. Twenty-two public witnesses testified at the hearings in Richmond.⁶ The following counsel appeared at one or more of the hearings: John W. Flora, Esquire, Brian Brake, Esquire, Richard D. Gary,

⁴ Hearing Examiner's Report at 2.

⁵ *Id.* at 4.

⁶ *Id.* at 5.

Esquire, and Charlotte McAfee, Esquire, on behalf of the Applicant; Anthony J. Gambardella, Esquire, Daniel Summerlin, Esquire, David S. Bailey, Esquire, and John C. Singleton, Esquire, on behalf of Highland Citizens; Melissa Ann Dowd, Esquire, on behalf of Highland County; Wiley F. Mitchell, Jr., Esquire, on behalf of the Nature Conservancy; Michel A. King, *pro se*; and Wayne N. Smith, Esquire, Donald H. Wells, Esquire, and William H. Chambliss, Esquire, on behalf of the Commission's Staff ("Staff"). On January 19, 2007, post-hearing briefs were filed by Highland Wind, Highland Citizens, Nature Conservancy, Michel A. King, and Staff.

The Hearing Examiner's Report included the following findings and recommendations:⁷

1. The proposed facility will have no material adverse effect upon the reliability of electric service provided by any regulated public utility;
2. The proposed facility advances the goal of electric competition in the Commonwealth;
3. The proposed facility will have a positive impact on economic development within the Commonwealth;
4. Construction and operation of the proposed facility will not be contrary to the public interest;
5. Any Certificate issued by the Commission in this case should include a sunset provision that calls for the Certificate to expire if construction has not commenced within two years from the date of issuance;
6. Any Certificate issued by the Commission in this case should require Highland Wind to comply with all permitting requirements listed in the [Department of Environmental Quality ('DEQ')] Report; and
7. Any Certificate issued by the Commission in this case should require Highland Wind to comply with the following conditions recommended in the DEQ Report to minimize adverse environmental impact:

⁷ *Id.* at 82-83.

- a. Submit Final Site Plan to Reviewing Agencies – Provide a detailed site plan with project location maps showing the location of towers and all other components of the project including but not limited to the location of the three stream crossings, location of wetlands along the three stream channels, and location where the drilling beneath the stream channels will occur;
- b. Conduct Archaeological and Architectural Surveys if Necessary – Coordinate with [Department of Historic Resources ('DHR')] for guidance regarding the potential need for archaeological and architectural surveys, recommended studies and field surveys to evaluate the project's impacts to historic resources;
- c. Avoid Direct and Indirect Impacts to Wetlands – Wetland and stream impacts should be avoided and minimized to the maximum extent practicable;
- d. Protect Natural Resources During Construction – Protect water quality, habitat, and aquatic resources from construction impacts by adopting recommendations from the DEQ, [Department of Game and Inland Fisheries ('DGIF')], and [Department of Conservation and Recreation ('DCR')].
- e. Protect Species – Work closely with DGIF and [the United States Department of Interior, Fish and Wildlife Service ('U.S. Fish and Wildlife Service')] to ensure that threatened and endangered species are adequately protected.
- f. Conduct Post-Construction Monitoring and Mitigation Plan – Conduct post-construction monitoring and mitigation plan as outlined [in the Hearing Examiner's Report].
- g. Coordinate Transportation Safety Issues – Coordinate closely with the Virginia Department of Transportation to evaluate and ensure that transportation issues are adequately addressed.

The following participants filed comments on the Hearing Examiner's Report on or before March 22, 2007: Highland Wind; Highland Citizens; Nature Conservancy; Michel A. King; and Staff.

On March 7, 2007, Highland Citizens filed a Motion for Stay, which requests the Commission "to stay this proceeding until the Supreme Court of Virginia issues its decisions in

Lucile Swift Miller, et al. v. Highland County, et al. (Record Number 062111) ('Miller Appeal') and *Tom Brody, et al. v. Highland County, et al.* (Record Number 062489) ('Brody Appeal')."⁸ Highland Wind, Nature Conservancy, and Michel A. King filed responses in opposition to the Motion for Stay, to which Highland Citizens filed a reply in further support of its motion.

On March 28, 2007, Highland Wind filed an objection "to the untimely and inappropriate letters to the [Commission] from 1) Raymond T. Fernald of [DGIF], dated March 21, 2007, 2) S. Rene Hypes of [DCR], dated March 21, 2007 and 3) Karen L. Mayne of [U.S. Fish and Wildlife Service], dated March 22, 2007."⁹ Highland Wind asserts that "[e]ach of these letters purports to respond to the Hearing Examiner's Report of March 1, 2007 but none of these agencies are parties to this proceeding and none has the authority to post such a response."¹⁰

NOW THE COMMISSION, having considered the record, the pleadings, the Hearing Examiner's Report, and the applicable law, is of the opinion and finds as follows.

Code of Virginia

Section 56-46.1 A of the Code states in part as follows:

Whenever the Commission is required to approve the construction of any electrical utility facility, it shall give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. ... In every proceeding under this subsection, the Commission shall receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection; and if requested by any county or municipality in which the facility is proposed to be built, to local comprehensive plans that have been adopted pursuant to Article 3 (§ et seq.) of Chapter 22 of Title 15.2. Additionally, the Commission (i) shall consider the effect of the proposed facility on

⁸ Motion to Stay at 1.

⁹ Highland Wind's March 28, 2007 letter at 1.

¹⁰ *Id.*

economic development within the Commonwealth and (ii) shall consider any improvements in service reliability that may result from the construction of such facility.

Section 56-580 D of the Code states in part as follows:

The Commission shall permit the construction and operation of electrical generating facilities upon a finding that such generating facility and associated facilities (i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility and (ii) are not otherwise contrary to the public interest. In review of a petition for a certificate to construct and operate a generating facility described in this subsection, the Commission shall give consideration to the effect of the facility and associated facilities on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § .

Sections 56-46.1 A and 56-580 D also contain nearly identical language explicitly limiting the Commission's authority in this matter:

In order to avoid duplication of governmental activities, any valid permit or approval required for an electric generating plant and associated facilities issued or granted by a federal, state or local governmental entity charged by law with responsibility for issuing permits or approvals regulating environmental impact and mitigation of adverse environmental impact or for other specific public interest issues such as building codes, transportation plans, and public safety, whether such permit or approval is granted prior to or after the Commission's decision, shall be deemed to satisfy the requirements of this section with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matters. Nothing in this section shall affect the ability of the Commission to keep the record of a case open. Nothing in this section shall affect any right to appeal such permits or approvals in accordance with applicable law.¹¹

¹¹ Va. Code § 56-46.1 A.

Section 56-596 A states in part that "[i]n all relevant proceedings pursuant to [§ 56-580 D], the Commission shall take into consideration, among other things, the goals of advancement of competition and economic development in the Commonwealth."

Conditional Use Permit

The Hearing Examiner properly found that the following matters were considered by Highland County in issuing Highland Wind a conditional use permit pursuant to Highland County's zoning ordinance and comprehensive plan: property values; tourism; viewshed; height restrictions; setbacks; lighting; color of structures; fencing; security measures; erosion and sediment control; signage; access roads; and decommissioning.¹² As a result, the conditional use permit "shall be deemed to satisfy the requirements of [§§ 56-46.1 A and 56-580 D] with respect to all [those] matters ..., and the Commission shall impose no additional conditions with respect to such matters."¹³ Accordingly, we shall not consider those matters herein.

Economic Benefits, Reliability, and Competition

We agree with the Hearing Examiner that the proposed facility will provide economic benefits and will have no material adverse effect upon the reliability of electric service provided by any regulated public utility.¹⁴ We also find that the project will not have a significantly measurable impact on the advancement of competition.¹⁵ The advancement of competition, however, is not a statutory prerequisite for approval of the application, and we conclude that the project will not hinder competition in the Commonwealth.

¹² Hearing Examiner's Report at 68.

¹³ Va. Code §§ 56-46.1 A and 56-580 D.

¹⁴ Hearing Examiner's Report at 69-70.

¹⁵ *Id.* at 69.

Environmental Impact and Public Interest

We must consider environmental impact. The statute, however, does not require the Commission to find any particular level of environmental benefit, or an absence of environmental harm, as a precondition to approval. Rather, the statute directs that the Commission "shall give consideration to the effect of the facility and associated facilities on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. . . ."¹⁶ We also must determine whether "such generating facility and associated facilities . . . are not otherwise contrary to the public interest."¹⁷

We find that the risk to bats and birds falls within the required statutory analysis of environmental impact and the public interest. A number of participants proposed various post-construction monitoring and mitigation plans, with various degrees of specificity, to address the risk to bats and birds. In this regard, we will evaluate: (1) whether a monitoring and mitigation plan is necessary to satisfy the statutory standards; and (2) whether a specific monitoring and mitigation plan can be developed and implemented that will satisfy those same standards.

The Hearing Examiner concluded that the application should be approved and that the Applicant and DGIF should be given an opportunity to determine specific monitoring and mitigation measures that would serve as a condition to such approval.¹⁸ Highland Citizens, however, assert that such an approach "eliminates any possibility for the respondents to

¹⁶ Va. Code § 56-580 D.

¹⁷ *Id.*

¹⁸ Hearing Examiner's Report at 78-82.

contribute."¹⁹ We find that all parties to this case and the Staff should have an opportunity to participate in the process contemplated by the Hearing Examiner.

Accordingly, we remand this case to the Hearing Examiner for further proceedings to address the development and implementation of a comprehensive post-construction monitoring and mitigation plan for our consideration. Such a plan should address, in detail and without exclusion, issues such as:

- 1) cost and funding;
- 2) the species or groups of species to be protected under the plan;
- 3) the role, if any, of DGIF and others;
- 4) monitoring procedures and schedules;
- 5) reporting procedures and schedules;
- 6) mitigation procedures and schedules;
- 7) the duration of each stage of the plan;
- 8) number of takes per wind turbine per year, for the species or groups of species to be protected, that the mitigation plan is designed to achieve;
- 9) any special provisions for endangered and threatened species;
- 10) triggering mechanisms;
- 11) operational modifications that will be required if the triggering mechanisms are met;
- 12) whether operational modifications are self-executing;

¹⁹ Highland Citizens' March 27, 2007 Response at 4.

- 13) to the extent that operational modifications are not self-executing, whether the Commission has the authority to permit another entity, such as DGIF, to direct operational modifications;
- 14) whether and how various parts of the plan are designed to be adaptive based on ongoing monitoring and mitigation results;
- 15) to the extent that the plan is adaptive, whether the Commission has the authority to permit another entity, such as DGIF, to direct adaptations to the plan; and
- 16) the extent to which the Commission should retain authority to require cessation and/or modification of operations of the proposed facility under any monitoring and mitigation plan.

Motion for Stay

Based on our decision to remand this case for further proceedings, we will defer ruling on the Motion for Stay.

Objection to Comments

Finally, we will not consider the letters filed in response to the Hearing Examiner's Report by DGIF, DCR, and U.S. Fish and Wildlife Service. Highland Wind's objection is well placed. In *Application of CPV Warren*,²⁰ the Commission rejected comments on the Hearing Examiner's report that were filed by public witnesses and by interested persons that were not formally participating as respondents in the proceeding. As in *CPV Warren*, in the instant case the Commission's Order for Notice and Hearing set forth how interested persons, organizations, and government entities could participate in this proceeding as respondents pursuant to Rule 5 VAC 5-20-80 C of the Commission's Rules of Practice and Procedure. In *CPV Warren*, as in this case, the Commission also required the applicant to publish notice of the proceeding as

²⁰ *Application of CPV Warren, LLC For a certificate of public convenience and necessity for electric generation facilities in Warren County, Virginia*, Case No. PUE-2002-00075, 2003 SCC Ann. Rept. 365 (2003) ("*CPV Warren*").

display advertising in a local newspaper of general circulation, and such notice also set forth how to participate as a respondent. Accordingly, in *CPV Warren* the Commission concluded, as we do here, that "[t]he Commission must decide this case on the evidence properly presented in the record" and "must . . . ensure that our procedures remain fair to the applicant and to those who participate in accordance with the Commission's orders and regulations."²¹

Accordingly, IT IS ORDERED THAT:

(1) This case is remanded to the Hearing Examiner for further proceedings as set forth herein.

(2) On or before May 15, 2007, the Company shall file with the Commission Clerk an original and fifteen (15) copies of testimony and exhibits addressing the matters on remand as set forth herein and shall serve a copy of the same on the Staff and all respondents.

(3) On or before June 19, 2007, each respondent and the Staff shall file with the Commission Clerk an original and fifteen (15) copies of any testimony and exhibits addressing the matters on remand as set forth herein and shall serve a copy of the same on the Staff, the Company, and all other respondents.

(4) On or before July 6, 2007, the Company shall file with the Commission Clerk an original and fifteen (15) copies of all testimony and exhibits that it expects to offer in rebuttal to the testimony and exhibits of the respondents and the Staff permitted herein and shall serve a copy of the same on the Staff and all respondents.

(5) On July 17, 2007, the Hearing Examiner shall convene an evidentiary hearing on remand. At the conclusion of the proceedings on remand, the Hearing Examiner shall issue a supplemental report to the Commission.

²¹ *CPV Warren* at 368.

(6) This matter is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.